

*a***BASIL OMAR****v.****PP***b*

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD SAARI YUSOFF JCA
KC VOHRAH JCA
[CRIMINAL APPEAL NO: S-05-27-94]
8 OCTOBER 2002

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 1,241g of cannabis - Whether accused in actual possession of drugs - Whether accused had physical control of drugs - Whether accused had knowledge of drugs - No affirmative finding of actual possession by trial judge - Whether drugs adequately analysed by chemist*

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Analysis of dangerous drug by chemist - Adequacy of - Representative samples - Leong Bon Huat v. Pendakwa Raya - Whether distinguishable on facts*

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CRIMINAL PROCEDURE: *Conviction - Upholding of - Appellate criminal powers of Court of Appeal - Whether conviction may be upheld despite misdirection if there is no miscarriage of justice - Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking in a dangerous drug - No affirmative finding of actual possession by trial judge - Whether a misdirection - Overwhelming evidence of possession - Whether conviction should be upheld - Courts of Judicature Act 1964, s. 60 (proviso)*

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This was an appeal from the decision of the High Court convicting the accused under s. 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in 1,241g of cannabis and sentencing him to death under s. 39B(2) thereof. The principal issues that arose for decision before the Court of Appeal were: (i) whether the accused was in actual possession of the impugned drugs; and (ii) whether the impugned drugs were adequately examined and analysed by the chemist.

Held:*h***Per Mohd Saari Yusoff JCA***i*

[1a] The evidence showed that the accused had physical control of the impugned drugs. From the conduct of the accused at the material time and the surrounding circumstances of the case, the irresistible inference was that the accused must have had knowledge of the impugned drugs inside the bag. (pp 422 h & 423 a-b)

- [1b] Although the trial judge never did make an affirmative finding that the accused was in actual possession of the impugned drugs, there was overwhelming direct and circumstantial evidence that the accused was in actual possession of the impugned drugs. Considering this fact, the appellate criminal powers of the Court of Appeal contained in the proviso to s. 60 of the Courts of Judicature Act 1964, and the decision of the Federal Court in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381, the conviction of the accused had to be upheld. (pp 423 g-h & 424 a-b) a
- [2] The chemist had taken representative samples (at random from different parts of the impugned drugs) weighing up to 120g from package 1 and 6g from package 2 for analysis. The facts in the instant case are thus distinguishable from those in the Supreme Court case of *Leong Bon Huat v. Pendakwa Raya* [1993] 3 CLJ 603. (p 423 e-f) b
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[Appeal dismissed.]

[Bahasa Malaysia Translation Of Headnotes] d

Ini adalah suatu rayuan terhadap keputusan Mahkamah Tinggi yang mensabitkan tertuduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 kerana mengedar 1,241g ganja dan dijatuhkan hukuman mati di bawah s. 39B(2) Akta tersebut. Isu-isu prinsipal yang timbul untuk diputuskan di hadapan Mahkamah Rayuan adalah: (i) sama ada tertuduh benar-benar memiliki dadah yang diragui; dan (ii) sama ada dadah yang diragui telah diperiksa dan dianalisa secara teliti oleh ahli kimia. e

Diputuskan:

Oleh Mohd Saari Yusoff HMR f

- [1a] Bukti menunjukkan bahawa tertuduh mempunyai kawalan fizikal dadah yang diragui. Daripada tingkah laku tertuduh pada masa material dan keadaan yang mengelilingi kes, kesimpulan yang tidak boleh dipertikaikan adalah tertuduh mesti mempunyai pengetahuan dadah yang diragui didalam beg. g
- [1b] Sungguhpun hakim perbicaraan tidak membuat kesimpulan mengesahkan tertuduh benar-benar memiliki dadah yang diragui, terdapat bukti-bukti yang jelas dan menyeluruh bahawa tertuduh benar-benar memiliki dadah tersebut. Mengambil kira fakta ini, kuasa-kuasa rayuan jenayah Mahkamah Rayuan yang termaktub di dalam proviso kepada s. 60 Akta Mahkamah Kehakiman 1964, dan keputusan *Tunde Apatira & Lain-lain v. PP* [2001] 1 CLJ 381, sabitan ke atas tertuduh mesti disahkan. h

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- a* [2] Ahli kimia telah mengambil contoh-contoh mewakili (secara rambang daripada bahagian-bahagian lain dadah yang diragui) berat sehingga 120g daripada paket 1 dan 6g daripada paket 2 untuk analisa. Dengan itu fakta-fakta di dalam kes ini adalah berbeza daripada kes Mahkamah Agung *Leong Bon Huat lwn. Pendakwa Raya* [1993] 3 CLJ 603.

b *Rayuan ditolak.*

Case(s) referred to:

Chan Pean Leon v. PP [1956] 22 MLJ 237 (*foli*)

Leong Bon Huat v. PP [1993] 3 CLJ 603 (*dist*)

Muhammad Hassan v. PP [1998] 2 CLJ 170 (*refd*)

- c* *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 (*foli*)

Legislation referred to:

Courts of Judicature Act 1964, s. 60(1)

Dangerous Drugs Act 1952, s. 39B(1), (2)

- d* *For the appellant - VK Liew; M/s VK Liew & Co*
For the respondent - Nurulhuda Mohd Nor DPP; AG's Chambers

[Appeal from High Court, Sandakan; Criminal Trial No: S1-90]

Reported by Gan Peng Chiang

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JUDGMENT

Mohd Saari Yusoff JCA:

This appeal was against the decision of the High Court of Sandakan in which the appellant ("the accused") was convicted on a charge of trafficking under s. 39B(1)(a) DDA 1952 and was sentenced to death under s. 39B(2) thereof. At the conclusion of the hearing, we unanimously dismissed the appeal.

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The charge against the accused reads:

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That you, on the 1st day of February 1990 at about 12.35 a.m., Jalan Batu Sapi, Pasir Putih, the District of Sandakan, in the State Of Sabah, on your own behalf did traffic in a dangerous drug, to wit 1,241 grammes of Cannabis and that you have thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under Section 39B(2) of the same Act.

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The Prosecution's Case

Briefly, the facts are as follows. On 31 January 1990 at about midnight, PW4 was in his taxi no. SS 7011 in front of Sandakan market when PW4 was approached by the accused. They struck a bargain whereby PW4 agreed to

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take the accused to Jaya Chip which was at the end of Jalan Batu Sapi for a fare of RM10. The accused boarded the taxi and sat in the front passenger seat next to PW4. There was no other person in the taxi.

At the time of boarding the taxi, the accused had a striped bag (P7) and a blue jacket (P8) with him. The taxi proceeded to Jaya Chip via Pasir Putih. On reaching Pasir Putih, the taxi stopped at a road-block which was set up by the police. At the road-block, the accused came out of the taxi at the request of PC Aziz (PW3). After having alighted from the taxi, the accused attempted to run away but PW3 caught him by the collar of his shirt. The accused put up a struggle before being handcuffed. On checking the front passenger seat, PW3 found a jacket on top of the striped bag (P7). PW3 took the bag to the bus stop near the road-block. In examining the bag, PW3 found a plastic bag therein with the word "Ajinomoto" written on it. In the plastic bag there were two packages stuffed with dried leaves. The police sent the dried leaves to the chemist for analysis. The result of the analysis was that the dried leaves in the two packages were cannabis within the meaning of s. 2 DDA 1952 and weighed 1,241 grammes.

The Case For The Defence

The case for the defence was that on the night in question, the accused had gone to a fish market at Sandakan with two others. From the fish market, the accused took a taxi to go to Kg. Bahagia. While enroute to Kg. Bahagia, the taxi stopped at a road-block at Pasir Putih. At the road-block, on instruction of the police, he alighted from the taxi and went to a bus-stop nearby. While at the bus-stop, the police handcuffed him. The accused denied carrying anything when he boarded the taxi. He also denied that PW4 was the driver of the taxi. In short, the defence was one of frame-up.

The Issues

At the hearing of this appeal, the issues which emerged were as follows:

- i) whether the accused had actual possession of the impugned drugs;
- ii) whether the impugned drugs were adequately examined and analysed by the chemist (PW1).

On The First Issue

The learned DPP submitted that, though there was no affirmative finding by the learned trial judge that the accused was in actual possession of the impugned drugs on the principle as enunciated in *Muhammad Hassan v. PP* [1998] 2 CLJ 170 FC, there was sufficient evidence to support a finding that the accused was in actual possession of the impugned drugs. Evidence led by prosecution and accepted by the trial judge may be enumerated as follows:

- a* i) at all material times, PW4 was the driver of the taxi with the accused sitting next to the former. Such finding was supported by the evidence of police personnel;
- ii) at the time of boarding the taxi, the accused was carrying a striped bag (exh. P7);
- b* iii) while in the taxi, the accused placed the bag and the jacket on his lap;
- iv) on sighting the road-block, the accused requested PW4 to turn back to town;
- c* v) on nearing the road-block, the accused placed the bag on the floor board in front of him and covered it with the jacket;
- vi) While at the road-block, the accused tried to run away but was stopped by PW3. Before the accused was being handcuffed, the accused put up a struggle.
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In *Chan Pean Leon v. PP* [1956] 22 MLJ 237 at p. 239 Thomson J (as he then was) said:

- e* “possession” itself as regards the criminal law is described as follows in *Stephen’s Digest* (9th Edition, page 304):

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

- f* To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.
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- h* On the facts and circumstances of this case as stated above, we agree with the learned DPP, that the accused had physical control of the impugned drugs. On conduct of the accused, the evidence established the following:

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- i) on sighting the road-block, the accused told the taxi driver (PW4) to turn the taxi back to town; a
- ii) the accused covered the bag with his jacket;
- iii) the accused tried to run away and on being stopped, the accused put up a struggle. b

From the conduct and surrounding circumstances of the case, the irresistible inference is that the accused must have knowledge of the impugned drugs inside the bag. On this issue, our finding is in the affirmative.

On The Second Issue c

En. Liew, the learned counsel for the accused, told the court that this issue was his strongest point. Our attention was drawn to the impugned drugs in package ex. "1" and in package ex. "2". He submitted that the impugned drugs were not adequately analysed on the ground that only 120 grammes (a little bit more than 10%) was taken for analysis from package ex. "1" and only 6 grammes was taken from the package ex. "2". Supreme Court case of *Leong Bon Huat v. Public Prosecutor* [1993] 3 CLJ 603 SC was cited in support of the defence's case. d

Adverting to the evidence of PW1 (chemist), we observe that PW1 took representative samples weighing 120 grammes from different parts of the impugned drugs in package ex. "1" for analysis and representative samples weighing 6 grammes from different parts at random from impugned drugs in package ex. "2". With greatest respect, we are of the view that the facts in *Leong Bon Huat v. Public Prosecutor (supra)* are distinguishable. In that case, according to the chemists testimony, out of cannabis weighing 793.85 grammes, he merely took representative samples from 79.30 grammes for analysis, leaving the balance of the cannabis not analysed. In the premise, we hold that the appeal on this issue is without merit. e

Reverting to the first issue, we are conscious of the fact that nowhere in his judgment did the learned trial judge make an affirmative finding that the accused was in actual possession of the impugned drugs. However, we are reminded of the Federal Court case of *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381. In that case, his lordship Gopal Sri Ram (JCA) said: f

As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross Anthony* g

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- a* *v. Public Prosecutor* [1996] 1 CLJ 705 exemplifies the general rule, while that in *Khoo Hi Chiang v. Public Prosecutor* [1994] 2 CLJ 151 illustrates the exception.

As for the instant case, the evidence, both direct and circumstantial, against the accused is, in our view, overwhelming, hence this is an appropriate case for the proviso of s. 60(1) CJA 1964 to apply.

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In the premise and for reasons abovestated, we dismissed the appeal. The conviction and sentence imposed by the court below is hereby affirmed.

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